IN THE FIJI COURT OF APPEAL

AT SUVA, FIJI ISLANDS

CIVIL APPEAL NO. ABU 0049/2007

[On Appeal from the High Court in Judicial Review Nos. 10,11,& 16 of 2003 (Consolidated)]

BETWEEN : **TRANSPORT WORKERS UNION**
(Original Applicant/Interested Party)

Appellant

AND : **ARBITRATION TRIBUNAL (Original Respondent)**

1st Respondent

: **AIR PACIFIC LIMITED (Original Respondent)**

2nd Respondent

Coram : **Byrne, J.A,**
Goundar, J.A

Counsel : **H.K. Nagin for the Appellant**
: **P. McDonell for the Respondent**

Date of Hearing: 15th September 2009

Date of Judgment: 16th October 2009 at 9.15 am.

JUDGMENT OF THE COURT

INTRODUCTION

[1.0] This Appeal came on for hearing originally on 11th November 2008 before Mr. Justice Byrne, Mr. Justice Khan and Mr. Justice Bruce. It was part heard and was adjourned until 20th November 2008. Due to insufficient time on that day, the appeal was not completed and was adjourned until the 3rd of March 2009.

[2.0] On that day the parties appeared before Mr. Justice Byrne, Mr. Justice Khan and Mr. Justice Mataitoga. The parties pointed out that the matter was part heard and the bench should be constituted by the same three judges. After some discussion it was agreed that the parties would file further written submissions, and if required could be called before the same three-member bench during the next sitting of the Court in 2009.

[3.0] That sitting was overtaken by the events of the 10th of April 2009 and with it the non-appointment to this bench of Justices Khan and Mataitoga.

[4.0] In the circumstances and so that this appeal might be heard as expeditiously as possible, exercising the power given under Section 6 (2) of the Court of Appeal Act, Byrne, J.A the Senior Presiding Judge being of opinion that it was impracticable to summon a Court of three Judges directed that the bench be constituted by two Judges which it now is.

[5.0] The Court has received written submissions and heard oral submissions from the parties on the 15th of September 2009.

NATURE OF THE APPEAL

[6.0] The Appeal and Cross-Appeal concern a judgment of Pathik, J in the High Court dated 13th October 2006 which concerned three applications for Judicial Review, namely Numbers 10,11 and 16 of 2003 involving the same parties against two awards of the Permanent Arbitrator. The reviews were consolidated. Two of them, numbers 10 and 16 were filed by the Transport Workers Union (**"THE UNION"**), the appellant and number 11 filed by Air Pacific Limited, the respondent.

THE AWARDS OF THE PERMANENT ARBITRATOR

[7.0] The Permanent Arbitrator had been asked to make awards concerning working conditions and practices of employees of the second respondent. Each application for Judicial Review challenged different aspects of the Awards.

[8.0] Originally the appellant challenged the judgment of Pathik, J on four issues namely:

(i) Acclimatization

(ii) Retirement Age

(iii) Overweight and Blemishes

(iv) Crew complement

[9.0] The second respondent's appeal or as it is called Respondent's Notice was in relation to Hours of Work. The appellant informed the Court that the retirement age issue had been resolved between the parties so this does not concern us.

COLLECTIVE AGREEMENT

[10] As in many industrial disputes there was a collective agreement between the parties made under the Trade Disputes Act (Amendment Decree 1992). This Decree defines Trade Disputes as being first as to interest and secondly as to rights.

[11] A collective agreement between a Union and an Employer is a product of negotiations, and when negotiations fail, then it is referred to Arbitration and an Award is then made under the Trade Disputes Act.
Section 34 of the Trade Disputes Act provides for registration of Collective Agreements.

[12] No collective agreement is cast in stone and can be changed by the following procedure:

(i) If the Union or Employer is not happy with some of the terms of the Collective Agreement it can apply for change by giving a log of claims to the other.

(ii) The Employer and Union then enter into discussions and may agree to vary the Collective Agreement and this will then be registered with the Permanent Secretary for Labour and Industrial Relations.

(iii) If the parties do not agree then the dispute can be reported as a Trade Dispute and thereafter follow the Trade Disputes Machinery concluding in an Arbitration Award.

[13] It is not correct to say as a matter of law that an agreed term cannot be unreasonable if the parties accept it. There are many examples in the case law of terms that are regarded as unreasonable and hence unenforceable despite the fact that the parties had agreed to the terms.

[14] The Court does not accept the assertion of the appellant that to maintain an existing term there is no necessity for evidence to justify the term. The Court agrees however that an Arbitration Tribunal may lawfully refuse to change an existing term of agreement and will not be taken to have made an error of law provided it has followed a lawful process.

[15] Judicial Review is first and foremost an examination of the process by which a decision was reached, as the Learned Judge recognized. Thus a decision not to change a term is still a decision that can be reviewed.

ACCLIMATIZATION DECISION

[16] Clause 32.4 of the Collective Agreement makes provision for acclimatization and states : ***"when a tour of duty includes a stay of more than 48 hours in a time zone, with a time difference of more than 2 hours from the last departure airport, the rest period at home on completion of that tour of duty shall be not less than 24 hours. This shall be in addition to the days off provision under clause 35".***

[17] The second respondent claimed that acclimatization rest should be part of the days off provision and not in addition to the days off provision. The Tribunal rejected this claim and the second respondent sought judicial review of that part of the decision.

SUBMISSION BY THE SECOND RESPONDENT TO THE HIGH COURT

[18] Air Pacific Limited submitted that in rejecting the company's claim that acclimatization rest should be part of the days off provision, the Tribunal took into account an irrelevant consideration when it stated that the company's decision was lawed with an incourigible flaw because the principle underlying the right of acclimatization and days off is predicated on separate and distinct considerations. The company referred the Judge to the principles and guidelines for Duty and Rest Schedule in Commercial Aviation (pages 159 -163 of the record) which show quite clearly that the acclimatization provisions were built into the rest periods to run concurrently and so prevent loss and unproductive time. It argued that rest and acclimatization are one of the same and not separate issues.

[19] It argued that the Tribunal failed to take into account comparative international airline practice and inefficient use of employee time.

[20] To acclimatize means to "adapt to a new temperature, altitude or climate environment". We agree with the Learned Judge that it is part of the need for rest and that consequently rest periods may be required to be longer but they are not separate from rest.

[21] The company submitted to Pathik, J that therefore the Tribunal made an error of fact and thus misdirected itself. The Learned Judge accepted this submission.

[22] It cited three cases to support its submission. The first was *Cheshire County Council v. Secretary of State for the Environment (1995) ENV.L.R.316* in which it was held that if there was an error in the factual background of which the Secretary of State should have been aware in making a decision on waste disposal, then his decision would have failed to take into account the correct factual background and as such was judicially reviewable.

[23] The second case was *Regina v. Secretary of State for Education Ex parte E (1996) ENV.L.R 312*, a decision of Mr. Justice Hidden of the High Court of England. This case concerned a 13-year old girl who had appealed against a decision of a Local Education Authority refusing to specify an orthodox Jewish School which the applicant could attend. Hidden, J held that the decision took into account matters which should not have been taken into account and, as such, was irrational.

[24] The third case cited by the second respondent and relied on by Pathik, J was *Hemns v. Wheeler (1948) 2 K.B 61*, a decision of the Court of Appeal. The Court held that it is always a question of law whether there was evidence to support findings of fact (in this case by a County Court Judge) and whether the inferences drawn were possible inferences from the facts as found.

[25] The appellant had submitted that the Tribunal was well within his powers to refuse the application by the Company to amend Clause 32.4 by deleting the provision relating to days off in the second sentence of that Clause. The appellant argued that the learned judge erred in relying on *Hemns v. Wheeler*. The learned judge agreed with the company's submissions and that the tribunal took into account irrelevant considerations. These were the failure by the Tribunal to give weight to comparative airline practice such as that of Air New Zealand and Qantas. The Judge held that acclimatization should be considered as part of the need for rest and recuperation for cabin crew and not be treated as separate.

[26] The Judge held that the object of the provision of rest periods was to prevent loss and unproductive work whilst providing adequate rest and that the Tribunal did not give due consideration to this aspect of the company's argument.

[27] This Court rejects the appellant's submission that the Judge was wrong in applying *Hemns v. Wheeler* which is not a case of judicial review. In our judgment Pathik, J recognized that but cited the case to support the principle that it is a question of law which will warrant the court's interference whether there was any evidence to support a tribunal's findings of fact.

[28] Given the present day competition between airlines and the relative strength in this region of Qantas and Air New Zealand compared with that of Air Pacific we consider it very relevant to note the comparatively weaker financial position of the second respondent with that of its major competitors in this area. In failing to make that comparison we share the learned Judge's view that the Tribunal committed an error of law and that he was correct in granting judicial review of the decision.

OVERWEIGHT AND BLEMISHES

[29] On this issue the Court accepts the decision of Mr. Justice Pathik that the company was not discriminating against its employees when it gave certain directions as to their being overweight and suffering skin blemishes. It seems to us that it is not unfair discrimination to require a worker to comply with health and safety requirements. In this regard we are of the view that the appellant's argument is misconceived and like the Learned Judge, we reject it.

THE CREW COMPLEMENT DECISION

[30] The second respondent sought to substitute Clause 29(b) of the Cabin Crew Collective Agreement with the words: "The minimum crew complement of all operations/configuration shall be in accordance with legal requirement". On this issue the Tribunal stated that Management must be ascribed some discretion and went on to state that :

"This Tribunal believes that the Company's arguments for the contemplated changes, does demonstrate an exceptional case. And I also believe that a clause which "mandates maximum crew even if the flight is empty" is nonsensical from a commercial perspective since it must be emphasized that the primary consideration in any employment situation is that an employee is remunerated on productivity, and not by simply "making up the hours or the numbers"".

In the outcome the Tribunal allowed the company's claim.

[31] The Appellant argued that the Tribunal did not take into account two important questions:

(i) Crew complement was a safety issue.

(ii) Safety in airline business is of paramount concern.

[32] The Learned Judge held that the Tribunal was entitled to reach the conclusion that the company must have a discretion on staffing levels based upon a commercial perspective in the absence of any evidence that the crew complements proposed were not in line with the regulatory requirements. The Judge said that to hold otherwise would mean that the court was substituting its own decision for that of the Tribunal which would be wrong in law. We agree.

CONCLUSION

[33] For the reasons we have given we conclude that the appellant's appeal on acclimatization, weight and blemishes and crew complement does not disclose any grounds justifying a review of the High Court's decision and the appeal will therefore be dismissed with costs to be paid by the appellant which we fix at $5,000.00.

POST SCRIPT

[34] Before parting with this appeal we think it desirable to make some brief comments on a submission by the first counsel for the Second Respondent in his submission of the 6th of December 2007 on the way in which the learned Judge applied ***Associated Provincial Picture Houses Ltd v. Wednesbury Corporation*** **(1947) 2 All. E.R 680.**

[35] It was stated in paragraph 3.9 of this submission that Mr Justice Pathik referred directly to Lord Greene's test at page 685 of the Report and stated that he was of the view "that on the facts the Tribunal failed to give weight to comparative airline practice". It was submitted by Counsel that His Lordship was therefore referring to the illegality (mistake of fact) test enunciated in Wednesbury. It was then submitted to us that if we consider that the test referred to was in fact the irrationality test then His Lordship's decision was still justified.

Again we agree because in our view by whatever yardstick Pathik, J arrived at his decision in dealing with Wednesbury, his decision was still correct.

[36] Where we join issue with the second respondent's first submission is the claim in paragraph 3.17 that in *Bromley London Borough Council v. Greater London Council* (1983) 1 A.C 768 *the House of Lords* abandoned the Wednesbury principles and endorsed the jurisdiction to review for unreasonableness in the broader sense.

[37] We can find no justification for this claim because for example Lord Diplock at pp 820-821, and Lord Scarman at page 836 give no such indication. Lord Scarman at p.836 said:

> ***"But the courts can intervene if it be shown that the discretion was wrongly exercised. The power of the court is limited by the well-known principle formulated by Lord Greene M.R in Associated Provincial Picture House Ltd v. Wednesbury Corporation [1948] 1 K.B. 223,233-234 and recognized by your Lordships' House in several cases, one of the latest of which is Newbury District Council v. Secretary of State for Environment [1981] A.C. 578, 608, 618-619, 627".***

[38] In our judgment those words of Lord Scarman cannot be read as an abandonment of the Wednesbury principles as they have been understood since Wednesbury was decided.

[39] But there is another comment which we think should be made and that is that whilst frequently the exposition of Lord Greene in Wednesbury at page 229 of (1948) 1KB 223 is cited, very rarely do the Courts mention the case of *Short v. Poole Corporation (1926) Ch. 66* which Lord Greene mentions. We refer to his approval of the example of the red haired teacher dismissed because she had red hair, which Warrington L.J gave.

[40] In *Short v. Poole Corporation* the defendants, the Local Education Authority, in pursuance of a report of their Education Committee, decided that the retention of married women teachers in their public elementary schools was inadvisable, and gave the Plaintiff, a married woman teacher, notice to terminate her engagement, after satisfying themselves that her husband was able to maintain her.

[41] It was held by the Court of Appeal (Pollock, M.R, Warrington, L,J. Sargant, LJ, ***"that the Plaintiff had failed to establish that the defendants had taken into account matters other than those which belonged to their educational sphere; that neither their decision nor either of the reasons upon which it was alleged to be founded was alien or irrelevant to the maintenance of the efficiency of the public elementary schools or the cause of education in the district; that their willingness to make concessions in cases of grievous hardships did not invalidate their policy of maintaining educational efficiency; and that as the defendants had acted bona fide and within their statutory powers, the Court would interfere".***

[42] In our judgment Mr Justice Pathik's decision can also be supported by *Short v. Poole Corporation* in as much as he was not satisfied that the second respondent had taken into account any irrelevant matters in reaching its decision on the three questions under appeal, and had acted bona fide.

[43] Thus in our view Lord Greene's most felicitous judgment in Wednesbury is still alive and well and we venture to predict that it will survive for as long as applications for Judicial review come before the Courts. We have nothing further to add.

Dated at Suva this 16th day of October 2009.

FIJI COURT OF APPEAL

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Hon. Justice John E. Byrne
Judge of Appeal

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Hon. Justice Daniel Goundar
Judge of Appeal